Supreme Court, U.S.
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No. 89-1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Whether petitioners have a right of appeal from the District Court's change of venue order which transferred their cause of action from the Western Division to the Eastern Division of the Northern District of Illinois.

2. Whether the Circuit Court of Appeals has a duty to treat an improper appeal as a petition for a writ of mandamus.

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JURISDICTION

The Petition for Certiorari does not present this Court with any jurisdictional basis to review the issues stated therein. There is no conflict among the circuits so as to invite review by this Court under Supreme Court Rule 17. Moreover, the Circuit Court has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a).

STATEMENT OF THE CASE

On February 3, 1988, petitioners filed their First Amended Complaint naming defendant Wilson & McIlvaine (the respondent herein).[1] The eleven count Complaint attempts to allege numerous causes of action against sixty-eight defendants, including Does 1-50. The Complaint alleged violations of RICO, the Civil Rights Act, and numerous pendent state law claims including fraud, fraudulent concealment, and negligence. All of the allegations related to the design, construction, management, or maintenance of the John Hancock Center, a 100 story commercial, office and residential building constructed in Chicago, Illinois

[1] Petitioners' statement of the case omits and mischaracterizes much of the procedural history in this action. Therefore, respondent, Wilson and McIlvaine, finds it is necessary to present this Court with a short summary of the history of the case. Also, respondent firm's name is now Burke, Wilson & McIlvaine.

in the period of 1965 to 1968. On February 23, 1988, respondent timely entered an appearance and on March 15, 1988, it filed a Change of Venue Motion requesting the District Court to transfer the case from the Western Division to the Eastern Division within the Northern District of Illinois. In addition, on March 25, 1988, respondent filed its Motion to Dismiss the Plaintiffs' First Amended Complaint.

Petitioners' response to the Change of Venue Motion was due on May 13, 1988. After filing eleven Motions for Extension of Time and twelve other motions, the petitioners finally filed a response entitled "Plaintiff's Verified Motion That Action Be Tried in DeKalb, Illinois, Strike, Dismiss, and Sanction Defendant's Motions Rule 12(f) and Sanctions Rule 11, and Response to Defendant's Replies and Motions to Dismiss or Transfer Venue." This Motion was filed on March 21, 1989, approximately one year after the respondent filed its motions to dismiss and transfer venue. On April 12, 1989, the magistrate entered an order recommending to the District Court that venue be transferred from the Western Division to the Eastern Division of the Northern District of Illinois. On October 2, 1989, the District Court adopted the Magistrate's Order and recommendation. On November 15, 1989, the petitioners filed a Notice of Appeal to the Seventh Circuit Court of Appeals and on December 14, 1989, the Seventh Circuit dismissed the appeal. This petition for certiorari followed. On June 26, 1990, the District Court dismissed petitioners' First Amended Complaint with prejudice for want of prosecution. Thus, no underlying cause of action exists as of the date of filing of this response.

SUMMARY OF ARGUMENT

An order transferring venue is interlocutory in nature and not a final order from which an appeal may be taken pursuant to 28 U.S.C. §1291. Therefore, the Seventh Circuit properly dismissed the petitioners' appeal from the District Court's transfer of venue order. In addition, a Circuit Court of Appeals is under no duty to treat an appeal as a petition for a writ of mandamus.

ARGUMENT

A. PETITIONERS HAVE NO RIGHT TO AN APPEAL FROM THE CHANGE OF VENUE ORDER

The District Court's order transferring venue is not a final order that is appealable under 28 U.S.C. §1291. *In Re Dalton*, 733 F.2d 710 (10th Cir. 1984) ("an order transferring venue of an action, even if the transfer is to a district in another circuit is an interlocutory order and unappealable, . . ."), *cert. dismissed*, *Dalton v. United States*, 469 U.S. 1185 (1985); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3d Cir. 1984) ("for many years this court—and virtually every other court—has held that such orders transferring venue are not appealable."). A Circuit Court's jurisdiction under Section 1291 to review a final order "depends on the existence of a decision by the District Court that ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The

District Court's order transferring venue in this case from the Western Division to the Eastern Division of the Northern District of Illinois only determines the site for the litigation. This order clearly does not dispose of the litigation on the merits. *See In Re Dalton*, 733 F.2d at 714.

Petitioners have argued that the collateral order doctrine should allow this otherwise impermissible appeal. The collateral order doctrine allows for an appeal under certain circumstances to be taken from an otherwise unreviewable interlocutory order. This Court summarized such requirements, originally set forth in *Cohen v. Beneficial Insurance Loan Corp.*, 337 U.S. 541 (1949), in the following language:

> To come within the "small class" of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 11-12 (1983) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The court in *In Re Dalton* explicitly refused to apply the collateral order exception to a venue transfer order "even though postponing review forces the would-be appellant to litigate in the forum he seeks to avoid." *In Re Dalton*, 733 F.2d at 715. The court did not consider this to be the type of "irretrievable loss of a collateral right" necessary to satisfy the requirements of *Cohen*. *Id.*

Review of the District Court's conclusion that venue is proper in the Eastern Division of the Northern District of Illinois can be effectively obtained by petitioners' filing a petition for a writ of mandamus as indicated by the

Seventh Circuit's Order dismissing the appeal. While petitioners may be "inconvenienced in the interim," there is no reason why the propriety of the transfer order needs to be considered prior to a final judgment. *See Jesko v. United States*, 713 F.2d 565, 567-68 (10th Cir. 1983). Therefore, application of the collateral order doctrine in this case is precluded and petitioners have no right to an immediate appeal.

Further, petitioners did not present the Circuit Court of Appeals with an "important issue" within the meaning of *Cohen*. While the transfer of venue order may inconvenience petitioners and allegedly poses some risk to their health, it is not a "serious and unsettled question" of general importance beyond the scope of this litigation. *Cohen*, 337 U.S. at 546-47. Allowing appeal from this order would do little to establish meaningful judicial standards. *See Donlon Indus., Inc. v. Forte*, 402 F.2d 935 (2d Cir. 1968) (where the appropriateness of a discretionary order denying security was not "important" within the meaning of the *Cohen* exception.)

B. THE DISTRICT COURT DOES NOT HAVE A DUTY TO TREAT AN IMPROPER APPEAL AS A PETITION FOR A WRIT OF MANDAMUS

Although a Court of Appeals may treat an improper appeal as a petition for mandamus, the exercise of this power is discretionary and does not rise to the level of imposing a duty on the Court. *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773 (3d Cir. 1984). The exercise of this discretionary review is predicated on the potential for prejudice to the litigants and the fact that the party seeking relief is barred from all avenues of immediate appeal. *Id.* In *Nascone*, the Third Circuit allowed mandamus review because the transfer order in question was enforcing a

forum selection clause and the transfer involved was from Pennsylvania to Utah. The court stated that "unlike the myriad factual considerations relevant to the exercise of discretion in a standard transfer situation, transfer based on a forum selection clause is particularly suited to appellate review by mandamus." *Id.*

The facts underlying petitioners request to treat their appeal as a petition for mandamus do not present the burdens and complex legal issues involved in *Nascone.* This is a "standard transfer situation" changing venue between divisions within the same judicial district. Therefore, the Circuit Court did not act improperly in refusing to treat the appeal as a petition for mandamus.

The Seventh Circuit takes a more conservative approach. In *Gearney v. Carlson*, 776 F.2d 140, 142 (7th Cir. 1985), the court acknowledged that it could construe an appeal as a petition for mandamus, but refused to take this action. The court found that the case did not present "exceptional circumstances" warranting mandamus relief and appellants had not specified the nature of the relief sought or complied with Federal Rule of Civil Procedure 21(a). *Id.* Thus, the Seventh Circuit has clearly followed its own precedent in dismissing this appeal and directing petitioners to file a petition for mandamus.

Petitioners claim there is a conflict in the Circuit Courts regarding whether or not a Circuit Court of Appeals must treat an improper appeal as a petition for a writ of mandamus relying on Supreme Court Rule 17(a) as the basis for jurisdiction on their petition for certiorari. This "conflict" does not exist. An analysis of the cases cited by petitioners shows that they have attempted to take a court's application of a discretionary rule and label it a conflict.

Both of the cases remotely on point cited by petitioners to support their "conflict," state the general rule that depending on the circumstances of a case, a Court *may* treat an appeal as a petition for a writ of mandamus. *Sterling Forest Assoc., Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 252 (4th Cir. 1988); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31, 35 (2d Cir. 1988). In *Sterling Forest*, the Court stated that it has the power to treat the appeal as a request for mandamus, but based on the facts of the case, did not need to exercise that power. *Sterling Forest*, 840 F.2d at 252-53.

In *Corcoran*, the Second Circuit Court stated that, "Although our normal practice is to decline to treat improvident appeals as petitions for mandamus, . . . we believe this case warrants a departure." *Corcoran*, 842 F.2d at 35. This language clearly indicates that the *Corcoran* Court was exercising its discretion, and not acting in conflict with an established rule. In that case, the Court had previously determined that the parties were not entitled to appeal a District Court's order remanding a removal case to the state court. The Second Circuit considered the appeal as a mandamus action because of the "public interest" involved. The case had been delayed for two and a half years because of actions outside of the parties' control and the Court did not want to delay the cause further by requiring them to file new papers to obtain a review by mandamus. *Id.*

Sterling Forest and *Corcoran* demonstrate that treating an appeal as a mandamus action is discretionary with the Circuit Court of Appeals and not a source of a "conflict among the circuits". In the present case, the Circuit Court did not find facts and circumstances to warrant treating petitioners' appeal as a mandamus. Instead they denied

the appeal and instructed petitioners to file a mandamus action in order to secure review of the transfer order. The Seventh Circuit's action was entirely within its discretion and not in conflict with other circuits. However, after the Seventh Circuit's order of dismissal, the petitioners elected not to file a petition for a writ of mandamus.

C. THE PETITION FOR CERTIORARI SHOULD FAIL AS IT DOES NOT COMPLY WITH SUPREME COURT RULE 21.5

Supreme Court Rule 21.5 states that "[t]he failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." This petition resounds of inaccurate and incomplete statements of the record and inflammatory assertions. Petitioners make allegations and raise issues never before presented in this case. Based on the composition of the petition alone, this Court would have an adequate basis for denying the petition for a writ of certiorari.

CONCLUSION

This Court has not been presented with the grounds necessary to grant the petition for certiorari. The District Court's transfer of venue order was clearly not appealable and the Seventh Circuit was under no duty to treat petitioners' improper appeal as a petition for mandamus. Moreover, petitioners have not followed the appropriate avenue for review by filing a petition for mandamus as noted by the Seventh Circuit in its order of dismissal. Further, the Court is not presented with a "conflict in the circuits" nor has the Seventh Circuit so far departed from normal judicial practice that its actions warrant Supreme Court review. Therefore, respondent respectfully requests that this Court deny the petition for certiorari.

Respectfully submitted,

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